APPEAL NO. 92009

On December 16, 1991, a contested case hearing was held in (city), Texas, to determine whether respondent's back injury, which she sustained in a slip and fall on her employer's stairs during her lunch hour, arose out of and in the course and scope of her employment. The hearing officer, (hearing officer), determined that respondent suffered a compensable injury and awarded her benefits under the Texas Workers' Compensation Act. TEX. REV. CIT. STAT. ANN. arts. 8308-1.01 *et. seq*. (Vernon Supp. 1992) (1989 Act). Appellant, The (employer), contends that respondent's injury was not sustained in the course and scope of her employment as a matter of law, and requests that we reverse the hearing officer's decision. Respondent, who represented herself at the hearing and on appeal, requests that we uphold the hearing officer's decision. Respondent asserts that appellant failed to disclose the identity of its witnesses prior to hearing.

DECISION

We affirm the hearing officer's decision and order awarding workers' compensation benefits to respondent.

On (date of injury), respondent was employed by (employer), an institution under the direction or governance of appellant, a self-insured entity under the provisions of Article 8309b. TEX. REV. CIV. STAT. ANN. art. 8309b (Vernon Supp. 1992). With certain exceptions not applicable to this case, the provisions of the 1989 Act apply to employees of institutions under the direction or governance of appellant. Article 8309b, Sec. 7. Appellant does not contest the hearing officer's findings that respondent slipped and fell on the employer's stairs during her lunch hour on (date of injury), and that she injured her back as a result of her fall. Appellant states its contention thusly: "Based on Respondent's testimony that she was not performing work on behalf of her employer at the time of her injury and based on her admission that she was not, at the time of injury, engaged in an activity on behalf of her employer which furthered her employer's affairs or business, the injury she received was not sustained in the course and scope of employment as a matter of law." Appellant cites Article 8308-1.03(12) and numerous Texas Workers' Compensation cases in support of its contention.

Respondent, respondent's supervisor, and a co-worker of respondent testified at the hearing. Neither party offered documentary evidence.

Since January 1991, respondent worked as a receptionist on the first floor of a building containing faculty offices and laboratories. She testified that after working the morning of (date of injury), she left her desk at lunch time and proceeded to walk up the stairs to the second floor to take her lunch in (Dr. K) faculty office. Dr. K is employed as an Associate Professor by the employer. As she was climbing the stairs, she said she slipped on something causing her to fall to the bottom of the stairs and injure her back. An ambulance was summoned to take her to the hospital.

Dr. K usually goes out to lunch. He has a television and VCR in his office which he uses for instructional purposes. Respondent testified that when she began working for her employer, several co-workers, including (Ms. S), invited her to eat lunch with them in Dr. K's office. Since then, she said she normally eats her lunch in that office with four co-workers, and that student workers sometimes join them for lunch there. She also said her supervisor was aware that she ate lunch in Dr. K's office, and that she was never told she could not eat lunch in that office. She also stated the Dr. K did not mind them eating lunch in his office; that it was a convenient place to eat lunch and relax; and that the television was an "nice extra."

Respondent further testified that she understood that she was not supposed to eat at her desk nor work through her lunch hour. She said she had eaten lunch at her desk a few times when she was allowed to work during part of her lunch hour in order to leave work early for doctor appointments.

According to respondent, there is no lunch room, designated place to eat lunch, nor vending machines on the first floor of her building. To her knowledge, the second floor has no lunch room either. Respondent said there is a snack bar in the basement of the "next building over," but she found no place to sit the several times she went there. She said that facility was mainly for students. She knew of no designated lunch area strictly for employees. Respondent explained that she does not go out for lunch due to the time and expense involved. Due to traffic and the location of her work in relation to eating establishments in town, she said she had been five to ten minutes late in returning to work on the occasions she did go out to lunch.

On cross-examination respondent testified that she was injured on her lunch break; that she was not performing or doing any work for her employer at the time of her injury; that she had never done any work for her employer while in Dr. K's office; and that she was not forced to remain on her employer's premises for lunch. When asked if it benefitted her employer for her to remain on the premises during lunch break, respondent mentioned that she had been late returning to work when she went out to lunch. When asked if it was really for her convenience that she remained on the premises, she stated "Yes, for ours, as well as theirs too -- like I said, for sure I would get back to work on time." She also testified that it is necessary to go to the second floor to eat lunch because there is no lunch room or designated place for lunch on the first floor where she works. She did not answer the question, "You were not engaged in the furtherance of the business of your employer at the time of your injury, were you?" because the hearing officer, after the question was asked, interjected "I think that's a conclusion to be drawn from this," and "Why don't you restate that question." Appellant restated the question as "At the time of your injury, were you doing any work for your employer," to which respondent answered "no."

(Ms. Z), who was respondent's supervisor on the date of respondent's accident, testified for appellant. Ms. Z, testified that respondent's work schedule on the date of injury was "8 to 12, 1 to 5;" that respondent was not scheduled to work at all "12 to 1;" that

respondent was not required to remain on the premises "12 to 1;" and that respondent was an hourly employee. She said that Dr. K's office was "definitely" not a designated lunchroom or break room, and that she never indicated to respondent that it was so. She testified that, to her knowledge, Dr. K does not invite all employees on the premises to his office to eat lunch. She estimated that it was about 150 feet from respondent's office to Dr. K's office, but only 20 feet from respondent's office to the closest building exit. She further testified that respondent was not performing any work for the employer at the time of respondent's accident, and that the employer did not benefit in any way from respondent remaining on the premises during the lunch hour. Her testimony reflected that she adjusted respondent's work hours on the occasions respondent worked during lunch.

In response to questions from the hearing officer, Ms. Z acknowledged that she was aware respondent and other employees had lunch in Dr. K's office, and that she never told respondent that she should not have lunch in Dr. K's office. She also said that Dr. K knew that employees were using his office for lunch.

Ms. S also testified for the appellant. She has worked for the employer for 23 years, is currently an administrative secretary, and works in the same main office area as respondent. She testified that she had eaten her lunch in Dr. K's office ever since Dr. K, who goes home for lunch, invited her to do so about 15 years ago. She said she has asked other secretaries she has worked with over the years to eat lunch in his office if they didn't have anything else to do. She said his office remains locked, but she has a key to it. She testified she has never been told by anyone not to eat lunch in his office, but that she does not eat lunch in his office when he has an appointment in the office at lunchtime. She also testified that Dr. K's office is not a designated lunchroom or break room, and that he does not invite all employees on the premises to eat lunch in his office. She said he uses the television in his office for classroom purposes and that it is not there for the benefit of employees.

Ms. S further testified that she did not witness respondent's accident but knew that respondent was going up to Dr. K's office to eat lunch because respondent came to her and got her key to his office. She also testified that, to her knowledge, respondent was not performing any work for the employer at the time of respondent's injury and that it did not benefit the employer in any way for respondent to remain on the premises during respondent's lunch hour.

Under the 1989 Act, a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). "Course and scope of employment" means "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Article 8308-1.03(12).

There are several Texas cases which involve the issue of whether an injury sustained

by an employee on the employer's premises during the lunch hour is compensable under the Workers' Compensation law.

In McKim v. Commercial Standard Ins. Co., 179 S.W. 2d 357 (Tex. Civ. App. - Dallas 1944, writ ref'd n.r.e.) the claimant was employed as a hatmaker on the second floor of her employer's establishment. She was paid by the hour. She was not paid for the lunch period. During the lunch period she went downstairs to the selling department of her employer's business. While engaged in the process of buying a hat, she slipped and fell and sustained an injury. In upholding an instructed verdict for the employer's carrier, the court reasoned that at the time of her injury, the claimant was not on duty and was not engaged in anything incident to her employment, but "was seeking a personal benefit, and at the time of her injury occupied the relation of a customer to her employer, and not the relation of an employee." The court concluded that the claimant's injuries were sustained while engaged upon a mission not required of her in the discharge of any duty for which she was employed.

In Texas Employers Insurance Association v. Davidson, 295 S.W. 2d 482 (Tex. Civ. App. - Fort Worth 1956, writ ref'd n.r.e.) the court held that the evidence supported a finding that the claimant's injuries, which were sustained in a fall during her lunch hour while walking toward a waste barrel to deposit waste from her lunch after she ate lunch at her sewing machine, were sustained in the course of her employment and that they arose out of her employment. The claimant was permitted but not required to eat lunch at her machine, paid by the hour, and not paid for the lunch hour. The court stated that "[w]hether an employee was in the course of employment when he received his injury is ordinarily a question of fact" and "[e]ach case must be determined upon its own peculiar facts." The court noted that it is not a necessary prerequisite to recovery that the injury occur during the hours of actual service, or that the employee be in the discharge of any specific duty incident to his employment. In upholding the finding for the claimant, the court quoted with approval the following passage from Bradbury, Workmen's Comp., 3d Ed., 524, as reported in Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 P. 374:

"The relation of master and servant, insofar as it includes the obligation of master to protect the servant, is not suspended during the noon hour, where the master expressly, or by fair implication, invites his servants to remain on the premises in the immediate vicinity of the work."

In Travelers Insurance Company v. McAllister, 345 S.W. 2d 355 (Tex.Civ. App. - Amarillo 1961, writ ref'd n.r.e.), the court held that the evidence supported a finding that the employee, who was fatally injured in a fall during his lunch hour from the top of a grain elevator his employer was constructing, was injured in the course and scope of his employment. All construction had stopped during the lunch period, and no one was able to explain his presence on top of the elevator during that period. His empty lunch pail was found in his car the next day. The court said that it could reasonably be concluded from the evidence that he either remained on top of the elevator during the lunch period, or had

returned there after eating his lunch for some purpose connected with his employment. The employer had no objection to employees eating their lunch on top of the elevator. In upholding the finding of injury in the course and scope of employment, the court cited several cases, including Davidson, *supra*., for the proposition that the master and servant relationship in workmen's compensation cases is not suspended during the noon hour where the master expressly or by implication invites his employees to remain on the premises in the vicinity of the work. The court noted that it found no case which holds that an injury received during the lunch period is not compensable as a matter of law.

In National Surety Corp. v. Bellah, 245 F. 2d 936 (5th Cir. 1957), the court held the evidence was sufficient to support a finding of injury in the course of employment where the claimant was injured during his unpaid lunch period as a result of slipping on the floor of the company cafe. We also note our decision in Texas Workers' Compensation Commission Appeal No. 91019 (Docket No. HO-00012-91-CC-1) decided October 3, 1991. In that decision we held that the evidence was sufficient to conclude that the employer restaurant invited employees to stay on its premises for lunch where the evidence showed that the employer provided a place for the employees to eat and reduced the price of meals for employees.

Having reviewed the evidence of record, the authorities cited by appellant in its request for review, and the authorities cited herein, we can not conclude that respondent's injury was not sustained in the course and scope of her employment as a matter of law. Appellant's reliance on a purported admission of respondent that she was not, at the time of injury, engaged in an activity on behalf of her employer which furthered her employer's affairs or business, is not supported by the record. As previously noted in our review of the evidence, respondent did not testify to that at the hearing. She testified that she was not performing or doing any work for her employer at the time of injury. It is not necessary to recovery that the employee be in the discharge of any specific duty incident to his employment. Davidson, *supra*.

Appellant refers us to Claimant's Answers to Carriers's Interrogatories Nos. 13 and 14 in support of its assertion that respondent admitted she was not in the course and scope of her employment. We will not consider those answers for the reason that Claimant's Answers to Carrier's Interrogatories were not made a part of the record developed at the contested case hearing. Article 8308-6.42(a)(1); *See*, Texas Workers' Compensation Commission Appeal No. 92005 (Docket No. TY-91-078627-01-CC-TY41) decided February 20, 1992.

In our opinion, the evidence raised a question of fact as to whether respondent's injury was sustained in the course and scope of her employment. We believe that it could reasonably be concluded from the evidence that the employer impliedly invited respondent to remain on its premises and in the vicinity of her work during her lunch period. *See*, Davidson and McAllister, *supra*. We hold that there is sufficient evidence to support the hearing officer's determination of a compensable injury, and that such determination is not

against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951).

Concerning respondent's complaint on appeal that appellant's witnesses were not disclosed to her prior to the hearing, we point out that no objection to the testimony of appellant's witnesses was made at the hearing. Ordinarily, evidence which is admitted without objection can not be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W. 2d 334 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge